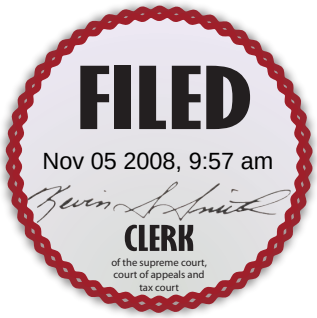

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IN THE
COURT OF APPEALS OF INDIANA

PHIL L. HONER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0806-CR-364
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0609-FA-44

November 5, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Phil Lewis Honer, Jr. (Honer), appeals his convictions for Count I, possession of marijuana, Class A misdemeanor, Ind. Code § 35-48-4-11; Count II, possession of three or more grams of cocaine within one thousand feet of a public park, a Class A felony, I.C. § 35-48-4-6(a) and (b)(3)(B)(ii); and Count III, possession of an automatic opening knife, a Class B misdemeanor, I.C. § 35-47-5-2.

We affirm.

ISSUE

Honer raises one issue on appeal, which we restate as follows: Whether the State presented sufficient evidence to support Honer's conviction for possession of three or more grams of cocaine within one thousand feet of a public park.

FACTS AND PROCEDURAL HISTORY

On September 6, 2006, around midnight, Officers Aaron Brick (Officer Brick) and Randall Goering (Officer Goering) of the South Bend Police Department, were traveling westbound on Western Street in South Bend, Indiana. As the Officers approached the intersection of Western and Walnut Streets, they pulled up behind an automobile stopped at a red light. While Officers Goering and Brick waited for the traffic signal to change, they observed the driver of the car, later identified as Honer, repeatedly looking back at them. When the light turned green, Honer tossed several clear plastic bags from his vehicle. The plastic bags landed to the left of the median separating the street. The Officers initiated a traffic stop. Officer Goering discovered that Honer was the only occupant of the vehicle and

began to question him. As Officer Brick retrieved the discarded plastic bags, he observed no other trash in the immediate area. A field test concluded that the discarded plastic bags contained cocaine and marijuana. Both parties stipulated that the drugs found were 12.86 grams of cocaine and marijuana. Officer Brick determined that the distance between where the cocaine and marijuana were recovered and Pulaski Park, a public park, was 111 feet.

On September 7, 2006, the State filed an Information, charging Honer with Count I, possession of marijuana, a Class A misdemeanor, I.C. § 35-48-4-11; Count II, possession of three or more grams of cocaine within one thousand feet of a public park, a Class A felony, I.C. § 35-48-4-6(a) and (b)(3)(B)(ii); and Count III, possession of an automatic opening knife, a Class B misdemeanor, I.C. § 35-47-5-2. On February 20, 2008, the case was presented to a jury. The jury found Honer guilty as charged. On March 20, 2008, the trial court sentenced Honer to a thirty-year executed sentence at the Indiana Department of Correction on Count I, one year on Count II, and three months on Count III. The trial court ordered Honer to serve the sentences concurrently.

Honer now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Honer argues that the State's evidence is insufficient to support his conviction for possession of three or more grams of cocaine within one thousand feet of a public park. We have previously expressed our standard of review for challenges to the sufficiency of evidence by stating:

> Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the

> evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. [] Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied* (citations omitted).

In order to convict Honer of possession of cocaine as a Class A felony, the State was required to prove beyond a reasonable doubt that Honer knowingly or intentionally possessed "the cocaine or narcotic drug in an amount (pure or adulterated) weighing at least three grams: . . . in, on, or within one thousand feet of . . . a public park." I.C. § 35-48-4-6(a) and (b)(3)(B)(ii). However,

> It is a defense for a person charged under this chapter with an offense that contains an element listed in subsection (a) that:
> (1) A person was briefly in, on, or within one thousand feet of . . . a public park . . . *and*
> (2) No person under eighteen years of age at least three years junior to the person was *in, on, or within* one thousand feet of the . . . public park . . . at the time of the offense.

I.C. § 35-48-4-16(a) and (b) (emphasis added).

Honer's argument on appeal focuses solely on the defense to his conviction. "A defendant bears an initial burden of proof by a preponderance of the evidence on any affirmative defense." *Adkins v. State*, 887 N.E.2d 934, 938 (Ind. 2008) (citing *Dearman v. State*, 743 N.E.2d 757, 761 (Ind. 2001); *Clemens v. State*, 610 N.E.2d 236, 241 (Ind. 1993); *Brown v. State*, 485 N.E.2d 108, 111 (Ind. 1985). Specifically, Honer contends that no person under eighteen was in, on or within one thousand feet of the park at the time of his

arrest. Honer offers that during cross-examination, Officers Goering and Brick failed to say that a child was present within the park or surrounding protected zone at the time of Honer's arrest, on September 6, 2006.

However, the State's evidence is sufficient to rebut Honer's defense. "It has long been a basic tenet of Indiana law that, although the defendant bears the burden of placing his affirmative defense in issue, the prosecution bears the ultimate burden of negating any defense which is sufficiently raised by the defendant." *Wolfe v. State*, 426 N.E.2d 647, 652 (Ind. 1981). The record reflects that, at trial, the State presented an aerial photograph and evidence indicating that the area within one thousand feet of the park includes both residential and commercial property. Officer Brick testified that the area is "very residential. There are some businesses. You got a pawn shop, things like that along Western, but it's a very residential neighborhood." (Transcript p. 38-39). Officers Brick and Goering also testified that prior to September 6, 2006, they had observed children in and near Pulaski Park. Officer Brick testified, "There's [sic] usually a lot of people walking around. The park is real popular on the weekend. You know, they play soccer and hang out. There's [sic] basketball courts over here." (Tr. p. 38). Officer Goering testified that there were houses containing families and children within the protected area. Further, Officer Goering testified that he had answered calls in Laurel Wood Court, a public housing complex within one thousand feet of the park, and had always observed children in the area.

Our review of the record indicates that the State presented evidence from which reasonable inferences may be drawn that a person under eighteen years of age was in, on, or

within one thousand feet of Pulaski Park. Therefore, we conclude that the State's evidence is sufficient to rebut Honer's affirmative defense.

CONCLUSION

For the foregoing reasons, we conclude that the State presented sufficient evidence to convict Honer of possession of three or more grams of cocaine within one thousand feet of a public park.

Affirmed.

BRADFORD, J., concurs.

BAILEY, J., dissents with separate opinion.

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BAILEY, Judge, dissenting

I respectfully disagree with the conclusion that the State presented sufficient evidence to rebut Honer's defense beyond a reasonable doubt. As the Majority observes, it is a defense if Honer was only "briefly in, on, or within one thousand feet" of Pulaski Park and if "[n]o person under eighteen years of age . . . was in, on, or within one thousand feet" of the park. I.C. § 35-48-4-16. As instructed, the State was required to overcome this defense beyond a reasonable doubt.[1]

Here, there is no disagreement regarding whether Honer was briefly in the area in

[1] For today's purposes, I need not determine whether the instruction is a correct statement of the law. See Ward v. State, 438 N.E.2d 750, 753 (Ind. 1982) (distinguishing "affirmative defenses that establish separate and distinct facts in mitigation of culpability and affirmative defenses that negate an element of the crime,"

question. Regarding the presence of children, Officer Brick testified that there are "usually a lot of people" walking around the park, which is "real popular on the weekend" and that he has seen "kids" in the area. Id. at 40, 72. He also described the surrounding area as "very residential" with some businesses. Tr. p. 38. The events at issue occurred around midnight on a Wednesday night. The park was closed and curfews had passed; thus, no children were present in the park itself. Further, Officer Brick could not say that the children he encountered on prior occasions lived in the "very residential" area.

Officer Goering also presented evidence on the subject. To the "best of [his] "knowledge," families lived in houses located within the area at issue, and those families included adults and children. Tr. at 140. We are left to speculate on the quality of the officer's knowledge. The officer did state that he had responded to calls in a public housing complex located within one thousand feet of the park, and that there were "always kids about." Tr. at 152. This testimony permits an inference that children lived in the complex at that time, but it does not show that those children resided in the complex on September 6, 2006, and, further, that they were present in their residences on that night.

As the Majority points out, the prosecution bears the ultimate burden of negating any defense which the defendant sufficiently raises and, in this case, according to the instruction given without objection, the State was required to negate Honer's defense beyond a reasonable doubt. In my opinion, the evidence did not meet that benchmark. I would vacate

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the latter requiring the State to establish beyond a reasonable doubt the absence of the defense or mitigating

the Class A felony and would remand with instructions to enter a conviction for Class C felony possession of cocaine weighing three grams or more.

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factor.)